U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 21 2005

EAC 03 233 53197

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner, a patent law firm, seeks to employ the beneficiary as a patent engineer/technical advisor/patent attorney. The director found that the beneficiary holds an advanced degree, but that the petitioner has not established that the beneficiary qualifies for classification as an alien of exceptional ability.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director, in denying the petition, stated "The evidence submitted included evidence that the beneficiary has attained a Masters degree," but the evidence is insufficient to support a finding of exceptional ability. This decision cannot stand, for several reasons. On its face, the decision appears to indicate that the director accepts that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but not as an alien of exceptional ability. The beneficiary, however, need not qualify for *both* classifications. Rather, the beneficiary need only qualify as a member of the professions holding an advanced degree *or* as an alien of exceptional ability. If (as the director implies) the beneficiary qualifies for the former classification, the petitioner need not demonstrate that the beneficiary qualifies for the latter classification.

If the director's error, described above, were the only issue in this matter, the petition could be approved without further discussion. Review of the record, however, reveals deficiencies and ambiguities that must be definitively resolved before any further action is possible.

The record of proceeding does not contain an approved labor certification. Instead, the petitioner has submitted two copies of a complete, uncertified application for labor certification (Forms ETA-750A and B). In a cover letter submitted with the initial filing of the petition, counsel states: "The petitioner is requesting for a waiver of the job offer and labor certification requirement under exceptional ability alien [sic]."

Because there is no such thing as a "waiver . . . under exceptional ability alien," we must determine what benefit the petitioner seeks on the beneficiary's behalf. Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(k)(4) state:

> (i) General. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.
>
> (ii) Exemption from job offer. The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

Part (i) of the above-cited regulations mentions Schedule A designation. Pursuant to Department of Labor regulations at 20 C.F.R. § 656.10(b), Group II of Schedule A requires "exceptional ability in the arts or sciences." (Group I of Schedule A relates solely to certain nurses and physical therapists, and thus clearly has no relevance to the present proceeding.) Part (ii) of the above-cited regulations discusses what is commonly known as the "national interest waiver," which is an exemption from the job offer and labor certification requirements. The national interest waiver and Schedule A designation are entirely separate, and indeed they are mutually exclusive; Schedule A designation requires a job offer, and thus cannot be considered as a waiver or exemption from the job offer requirement.

It is very important to note, here, that while CIS and the Department of Labor both use the term "exceptional ability," the two agencies have very different standards of what constitutes "exceptional ability," and the petitioner may not substitute one set of standards for the other. 8 C.F.R. § 204.5(k)(3)(ii) sets forth CIS' standards, which the petitioner must meet for the beneficiary to qualify for the immigrant classification established by section 203(b)(2) of the Act:

> To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the petitioner seeks for the beneficiary to be designated under Group II of Schedule A, then the petitioner must submit evidence to meet the Department of Labor's standards for "exceptional ability" at 20 C.F.R. § 656.22(d):

An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the widespread acclaim and international recognition accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer shall file, as part of the labor certification application, documentation concerning the alien from at least two of the following seven groups:

(1) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

(2) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.

(3) Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.

(5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

(6) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

(7) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

We note that designation under Schedule A does not require a *certified, individual* labor certification from the Department of Labor, but such designation is, in essence, an alternative *form* of labor certification rather than a *waiver* of the labor certification requirement. Other elements of the job offer requirement, such as demonstration of ability to pay under 8 C.F.R. § 204.5(g)(2), would still apply. Nevertheless, counsel's ambiguous reference to "a waiver of the job offer and labor certification requirement under exceptional ability alien," combined with the petitioner's submission of an uncertified Form ETA-750A (required for Schedule A designation but not for the national interest waiver), is sufficient to suggest that the petitioner *may* have intended to apply for Schedule A designation.

On the other hand, the only true "waiver of the job offer and labor certification requirement" is the national interest waiver. It is, therefore, certainly possible that the petitioner intended to apply for such a waiver on the beneficiary's behalf. We acknowledge, however, that counsel never used the term "national interest," nor offered any arguments as to why the beneficiary's admission would serve the national interest. Also, on Part 2 of the I-140 petition form, the petitioner is required to specify the classification sought by checking one of several lettered boxes. The petitioner did not check box "i," "An alien applying for a national interest waiver." Instead, the petitioner checked box "d," "A member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."

The petitioner's ambiguous filing includes some but not all elements of an application for Schedule A designation, and some but not all elements of an application for the national interest waiver. We simply cannot tell which of these benefits the petitioner meant to request (if, indeed, the petitioner or counsel fully grasps the difference between them). The director, in rendering the decision, completely ignored this very grave deficiency, focusing instead on a totally unnecessary requirement that the beneficiary must qualify as an advanced degree professional *and* (rather than *or*) as an alien of exceptional ability (as defined at 8 C.F.R. § 204.5(k)(3)(ii)).

Owing to critical omissions by both counsel and the director, we cannot render a definitive decision based on the record in its current form. The director must allow the petitioner a single, final opportunity to clarify the nature of the benefit sought, and the director must clearly explain that the national interest waiver of the job offer/labor certification requirement is entirely separate from classification under Group II of Schedule A. There is no regulatory provision to allow the petitioner to seek both of these benefits in the course of a single petition (e.g., the petitioner cannot state that it seeks Schedule A designation or, in the alternative, a national interest waiver). The petitioner must specify the benefit sought, rather than request, in effect, two full adjudications in order to provide two opportunities for approval.

If the petitioner is unwilling or unable to specify, clearly and unambiguously, which of these two mutually exclusive benefits it seeks on the beneficiary's behalf, then the director must deny the petition based on the lack of an approved labor certification, pursuant to 8 C.F.R. § 204.5(k)(4)(i). If the director does deny the petition for lack of an approved labor certification, we note that the regulations have never authorized the AAO to accept appeals from denials on that basis. Most recently, 8 C.F.R. § 103.1(f)(3)(iii)(B), as in effect on February 28, 2003, specifically excluded appeal rights in employment-based classifications "when the denial of the petition is based upon a lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act."

Once the petitioner has specified whether it seeks Schedule A classification or a national interest waiver on the beneficiary's behalf, the director must consider the merits of the Schedule A or national interest claim.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period

of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review, unless that decision is based on the lack of an approved labor certification, in which case no provision exists for appellate review.